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RECORD, CASE NO. 15105.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 789.

TOM MOORE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED AUGUST 18, 1892.

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1 Be it remembered that on this, the 20th day of April, A. D. 1891, there was begun and holden at the court rooms at Paris, Texas, a regular term of the honorable circuit court of the United States for the eastern district of Texas at Paris.

Present and presiding, Hon. D. E. Bryant, judge; also, present Rob't E. Hannay, U. S. attorney; J. J. Dickerson, U. S. marshal; C. Dart, clerk, and Frank Lee, asst. U. S. attorney, when the following proceedings were had, to wit:

TUESDAY, *April* 21, 1891.

Court met pursuant to adjournment. Presiding and present as on yesterday.

This day came the grand jury, and, a quorum being present, presented in open court the following bills of indictment, to wit:

THE UNITED STATES
v.
TOM MOORE & NELSE MOORE. } Charge: Murder. No. 152.

Each of which bills of indictment is ordered to be filed by the clerk.

2 *Bill of indct.*

In the name and by the authority of the United States of America.

In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit court aforesaid, on the third Monday, the same being the twentieth day of April, in the year of our Lord eighteen hundred and ninety-one, and continued by adjournment to and including the twenty-first day of April, in the year of our Lord eighteen hundred and ninety-one.

Eastern district of Texas, Sct. The grand jurors of the United States of America, duly elected, impanneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America in and for the district and circuit aforesaid, on their oath in said court present: That one Tom Moore and Nelson Moore, late of Choctaw Nation, Blue County, Indian Territory, in the district and circuit aforesaid, on the twenty-fifth day of July, in the year of our Lord eighteen hundred and eighty-nine, in Blue County, in the Choctaw Nation, in the Indian Territory, the same being annexed to and
3 constituting a part of said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with their malice aforethought, and with a certain deadly weapon, to wit, a certain gun, by the said Tom Moore and Nelson Moore then and there held, make an assault in and upon the body of one Charles Palmer with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said Tom Moore and Nelson Moore did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said Charles Palmer, inflicting thereon a

mortal wound, of which mortal wound the said Charles Palmer did languish, and, languishing, did then and there instantly die.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, the said Tom Moore and Nelson Moore did unlawfully, feloniously, and with their malice aforethought, kill and murder the said Charles Palmer, the said Charles Palmer being then and there a white person, and not an
4 Indian nor a citizen of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

J. E. ELLIS,
Foreman of the Grand Jury.

FRANK LEE,
Asst. U. S. Attorney, Eastern District of Texas.

(Endorsed:) No. 152. The United States vs. Tom Moore and Nelson Moore. Offense, murder. A true bill. J. E. Ellis, foreman of the grand jury. U. S. witnesses:

Kittie Palmer, Blue Co., Ind. Ter.
P. D. Harrell, " " " "
Jack Kimbren, " " " "
Harry Smith, " " " "
J. J. Breshers, " " " "
Geo. Hawkens, " " " "
A. Colbert, " " " "
W. B. Woodrum, " " " "
Charley Gibson, Emmett.
Dick Ross, Sherman, Tx.
John Lord, Ardmore, I. T.
Returned and filed in open court 21st day of April, 1891. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

5 (Further endorsed:) U. S. witnessed, continued:
Will Brashers, Boggy Depot.
Edmonson Brown, Emmett.
Sadie Palmer, Denison, Tex.
Isom Kearney, Emmett.

(Further endorsed:) We, the jury, find the defendant, Tom Moore, guilty of murder, as charged in this indictment. W. L. Dodd, foreman. April 29th, 1892.

(Circuit court—Criminal docket.)

APRIL 27, 1892.

THE UNITED STATES
vs.
TOM MOORE. } No. 152.

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendant, Tom

Moore, in his own proper person and by attorneys, appeared and
6 announced ready, and the said defendant, being arraigned, plead not guilty, and thereupon came a jury of twelve good and lawful men, to wit: W. L. Dodd, T. J. Van Zandt, T. R. Hackley, J. G. Maggs, H. H. Morris, R. H. Turner, R. B. Glover, Wm. Coffman, S. C. Gerron, A. B. Guthrie, M. C. Smith, and A. J. McDade, who, having been duly tried, impanneled, and sworn as required by law, and having heard the evidence, and the argument of the counsel having been begun but not concluded, the further consideration of this cause is postponed until to-morrow, and the jury was placed in custody of the marshal under instructions of the court.

(Circuit court—Criminal docket.)

APRIL 28, 1892.

THE UNITED STATES
vs. } No. 152.
TOM MOORE.

This cause coming on this day to be further heard, came the
7 United States, by her attorney, and announced ready, and the defendant, Tom Moore, in his own proper person and by attorneys, appeared and announced ready, the hearing of this cause was resumed before the court and jury of twelve good and lawful men, to wit:

W. L. Dodd, T. J. Van Zandt, T. R. Hackley, J. G. Maggs, H. H. Morris, R. H. Turner, R. B. Glover, Wm. Coffman, S. C. Gerron, A. B. Guthrie, M. C. Smith, and A. J. McDade, who, having been on yesterday duly tried, impanneled, and sworn as required by law to try this cause, and having heard the evidence and the argument of counsel and received the charge of the court, retired to consider of their verdict, and not having brought into open court their verdict at the hour of adjournment the further consideration of this cause was postponed until to-morrow and the jury was continued in the custody of the marshal under instructions of the court.

8 Circuit court. Criminal docket.

THE UNITED STATES
vs. } No. 152.
TOM MOORE.

This cause coming on this day to be further heard, came the United States by her attorney and the defendant Tom Moore in his own proper person and by attorney appeared and thereupon came the jury of twelve good and lawful men, to wit:

W. L. Dodd, T. J. Van Zandt, T. R. Hackley, J. G. Maggs, H. H. Morris, R. H. Turner, R. B. Glover, Wm. Coffman, S. C. Gerron, A. B. Guthrie, M. C. Smith, and A. J. McDade, who, having been heretofore duly tried, impanneled and sworn as required by law, and having heard the

evidence and the argument of counsel and received the charge of the court and retired to consider of their verdict, on this day brought into open court their verdict, in words and figures as follows, to-wit:

We, the jury, find the defendant, Tom Moore, guilty of murder as charged in this indictment.

APRIL 29TH, 1892.

W. L. DODD,
Foreman.

9 It is, therefore, considered by the court that the defendant Tom Moore is guilty of murder as charged in the indictment and as found by the jury, and it is ordered that he be remanded to the custody of the marshal to await the judgment and sentence of the court.

In United States circuit court, E. D. T.

MAY 2ND, 1892.

THE UNITED STATES *vs.* TOM MOORE. } C. # 152. Murder.

Now comes Tom Moore in person and by counsel and moves the court to set aside the verdict returned and judgment rendered in this case because the same is not supported by that amount and character of evidence that is required by law.

2nd. Because the court erred in permitting the U. S. attorney, over defendant's objection, to introduce evidence that one Camp had disappeared in November, 1888, and, not having been found, the neighbors thought he was dead and that deceased, Charles Palmer, and his
10 wife Kitty, now Kitty Young, suspected defendant and his brother, Nelson Moore, of having murdered said Camp and the court permitted a lengthy discussion by said attorney of said vague theory before the jury, calling their minds from the true issue, viz: "Did deft. murder deceased?"

3rd. The court erred in assuming that said Camp is dead; that he was murdered by defendant; that defendant murdered Charles Palmer in May, 1889, to prevent him from hunting for Camp's body, which assumption is deduced from the ruling on the admission of testimony and charge to the jury that the same was admitted to show a motive for the murder of Palmer, as said testimony and ruling was calculated to mislead the jury and prejudice them against defendant.

TOM MOORE, *Defendant,*
By F. W. MINER, *Attorney.*

(Endorsed.) No. 152. The United States vs. Murder Tom Moore. Motion for new trial. Filed May 2, 1892. C. Dart, clerk. By H. A. Kirkpatrick, deputy.

11 MAY 18, 1892.

THE UNITED STATES
v. } 152.
TOM MOORE.

This cause coming on this day to be heard upon the motion of the defendant for a new trial herein and the argument of counsel thereon being heard and duly considered by the court, because it is the opinion of the court that the law is against the defendant, the motion is overruled and a new trial herein is denied; to which ruling of the court the defendant in open court excepts.

JUNE 1ST, 1892.

THE UNITED STATES
versus } 152.
TOM MOORE.

Indictment for murder in the Indian Territory.

On motion of R. E. Hannay, esq., United States attorney for the eastern district of Texas, the defendant, Tom Moore, was on this day brought into open court at the bar thereof in custody of the marshal, and being asked by the court if he had anything to say why the sentence of
12 the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 29th day of April, A. D. 1892, shall not be pronounced against him, he says he has nothing to say further than he has heretofore said.

Whereupon, the premises being well and sufficiently understood, it is ordered, adjudged, and decreed by the court that the said Tom Moore, for his crime of murder of which he stands condemned by the verdict of the jury as aforesaid, be now remanded to the custody of the marshal of the United States for the eastern district of Texas and be by him committed to the jail of Lamar County, Texas, there to remain confined and imprisoned until the seventh day of September, A. D. 1892, when the said Tom Moore, shall, by the said marshal, between the hours of 10 a. m. and 4 p. m. of said seventh day of September, A. D. 1892, in the yard of the jail of said Lamar County, Texas, be hanged by the neck until he, the said Tom Moore, is dead.

13 *Bill of exep.*

THE UNITED STATES
vs. } No. 152. Murder.
TOM MOORE.

Be it remembered that on the trial of this cause, after the witnesses for the Government had proven that Charles Palmer, the person alleged to have been murdered by defendant, was found dead on the 25th day of May, 1889, the evidence further showing that he had been murdered by some person or persons;

The U. S. attorney proposed to prove by Mrs. Kitty Young that one Camp had disappeared from the same neighborhood during the month of

November, 1888, and had not been heard from since. That he was last seen in company with defendant and his brother, Nelse Moore; that Charles Palmer had been trying to find Camp's body; that the defendant knew Charles Palmer had been investigating the disappearance of Camp, which testimony of Mrs. Kitty Young relative to said Camp is substantially as follows:

Tom Moore, Nelse Moore, and Mr. Camp kept batch and lived
14 together about ¼ of a mile from my husband, Charles Palmer. About 9 o'clock at night during the month of November, 1888, Nelse Moore and Mr. Camp was at our house to borrow a horse from my husband to drive the next day to a wagon, stating they were going to Caddo. They did not get the horse. Mr. Palmer and myself promised Mr. Camp we would go down to the house and milk his cows while he was gone. Soon after they left on foot that night I heard a gun in the direction of their house. About one o'clock a. m. I saw Mr. Camp's wagon and horses pass our house coming from the direction of where they lived. Immediately after breakfast Mr. Palmer and myself went down to the Moore's house to milk the cows. There was no one there. We saw blood in the house and everything torn up around in the house. We saw a fresh horse wagon tracks which led down into the bottom. We followed it some distance and noticed where it returned by a different road and came into the road which passes our house. About 5 days after this Nelse Moore returned alone with the team and wagon that belonged to Camp. He was wearing Camp's boots. The defendant and Nelse claimed Camp's clothes, horses, watch, wagon, cows, and all the property which Camp had. I have never seen or heard of Camp since the night referred to.

15 Mr. Palmer was down in the woods hog hunting on Thursday before he was killed. When he returned that evening Tom Moore asked him where he had been. Mr. Palmer stated that he had been in the bottom hog hunting. Tom Moore said, "Yes, I know the kind of hogs you were looking for."

Tom and Nelse Moore owned no stock or property. Tom had no money. Mr. Palmer had been furnishing him provisions. Tom had been hired to Mr. Palmer, was familiar with the premises. Had been clearing land for Mr. Palmer on the place we lived on. The defendants claimed to have bought all Camp's property.

This testimony relative to Camp was permitted by the court, and he then and there instructed the jury that it was only admitted to show motive, not that Camp had been killed by defendant, as no corpus delicti had been shown, and that they would only consider it as to motive.

To all of which testimony defendant objected—

1st. Because the same is not pertinent to the issue.

2nd. The evidence is not confined to the point in issue.

3rd. There is no proof that Camp is not now living.

4th. The evidence has a direct tendency to prejudice the minds of the jurors against defendant.

5th. Because when a murder has been proved it is not necessary to prove affirmatively either motive, malice, or intent, but the killing
16 having been shown and the defendant connected with it, the burden of showing the absence of motive, malice, or intent devolves upon the defendant.

The court, upon hearing motion to exclude said evidence, overruled same, stating that the evidence was admitted, not for the purpose of proving or tending to prove that defendant was guilty of murdering Charles Palmer as charged in the indictment, but for the purpose of showing his motive for said act if done by him. The court instructed the jury, after the argument of counsel in submitting the case to them, that there was no evidence that Camp was dead. That the testimony in regard to Camp's disappearance and subsequent appropriation of his property is only admitted for the purpose of showing motive, and that they would not consider it for any other purpose. And to said ruling admitting said evidence defendant excepted, and prays that his bill of exception be signed and made a part of the record in this case.

F. W. MINER,
Attorney for Tom Moore.

Approved June 1st, 1892.

DAVID E. BRYANT, *Judge.*

(Endorsed:) No. 152. The United States v. Tom Moore. Bill of exceptions. Filed June 1, 1892. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

17 *Bill of excep'n, No. 2. C. C. 152.*

In the U. S. circuit court at Paris, Texas, May 18th, 1892.

THE UNITED STATES
vs.
TOM MOORE. } Murder.

Be it remembered that on this day came on to be heard the motion of defendant for a new trial, filed in this case on the 2nd day of May, 1892, said motion alleging that the verdict of the jury "is not supported by that amount and character of evidence that is required by law."

2nd. Because the court erred in permitting the U. S. attorney, over defendant's objection, to introduce evidence that one Camp had disappeared in November, 1888, and not having been found the neighbors thought he was dead, and that deceased, Charles Palmer, and his wife Kitty, now Kitty Young, suspected defendant and his brother Nelse Moore of having murdered said Camp, and the court permitted a lengthy discussion by said attorney of said vague theory before the jury, calling their minds from the true issue, viz: "Did defendant murder deceased?"

3rd. The court erred in assuming that said Camp is dead; that
18 he was murdered by defendant; that defendant murdered Charles Palmer in May, 1889, to prevent him from hunting for Camp's body; which assumption is deduced from the ruling on the admission of testimony and charge to the jury that *that* the same was admitted to show a motive for the murder of Palmer, and said testimony and ruling was calculated to mislead the jury and prejudice them against defendant."

And the court, having heard said motion and the argument upon the same and the testimony hereinafter set out, overruled the same and re-

fused a new trial herein, and to said ruling defendant excepted and prays that his exception be signed and made a part of the record herein, which is accordingly done.

Defendant says the testimony before the jury was as follows:

1st witness for the Government, John J. Brashear, testified:

Charles Palmer is dead. I found him May 25th, 1889, lying dead in the road; he had been shot. I found him about 4 o'clock p. m. in Sandy Creek Bottom, in Blue county, I. T. I had seen him that day about 12 m. at Jones' mill, from which I lived about a half a mile distant. I found him in the road from Jones' mill to Emmett and about one and one-half or two miles from his home, which was seven miles from Jones' mill. After I found the body I went on about fifty yards and found the end gate of a wagon, and a little farther found a chair, and in about 150 or 200 found his team; the wagon was against a tree. The ground where I found the body was hard, black land, and a little higher on each side than the road track. It is heavily timbered and trees within 30 feet of the road and some trees within 15 feet of the body. Off the road the ground was marshy. It is a very plain road, but not worked, not straight. Sandy Creek is about 200 yards west from where I found the body. I left Jones' mill before Palmer did, but went by home for my folks to go with me to Mr. Tidwells, my father-in-law; from there I went to Hoskin's and then to Tom Moore's house. He was not at home; found his wife Lizzie at home. Saw Tom Moore at Palmer's that night and asked him where he had been that day. He said I have been knocking around, hog-hunting. I saw some blood on the side of the Palmer's wagon bed, but did not notice the tracks. Nelson Moore and Tom Moore were both at Palmer's that night.

2nd witness for the prosecution, R. D. Harrill:

I live about one and one-fourth mile from Palmer's place. About 11 a. m. o'clock on the morning of the 25th of May, 1889, Nelson Moore passed my house alone in a wagon; had a double-shovel plow and a sack of corn in the wagon and told me he was going to Post Oak, to a blacksmith shop, some three miles distant. A little before sundown he came back and stopped, and while I was talking to him John J. Brashear rode up and informed us that he had found a man in the bottom that had been killed, and he believed it was Charles Palmer. I got in Moore's wagon and we drove to Palmer's, and there Nelson Moore got out to stay with the children, who were crying. When Nelson Moore got out George Hankins and H. Graham got in the wagon, and we three drove to the body, overtaking Mrs. Palmer, Mr. Fisher, and others just before reaching it. We carried the body home. I examined it and found a wound made by a ball, either Winchester or pistol, in the left side, below and left of nipple, that ranged towards the spine, a wound across the left hand, going through the ball of the thumb, that may have been made by the same ball; another wound on the right side, a little lower, going towards the spine, and a hole in the lower right arm, that may have been made by the same ball. Neither ball passed through the body. Emmett is four miles west from Palmer's, and Jones' mill about 8 miles east. Tom

Moore married a full-blood Choctaw woman on Tuesday before the killing on Saturday. Her name was Lizzie Lishtubbi. On the Sunday before, May 19th, Tom Moore came to my house to learn where he
21 could find my father, who is a preacher, saying he was going to marry Lizzie Lishtubbi, and wanted my father to marry them; that she claimed the land he was clearing for Palmer, and the house Fish, a tenant of Palmer, lived in, and if he married her she should have it. I told him he would have trouble over it, for Charley Palmer is about the gamiest man in the Territory. He replied, "I am some that way myself." As he started to leave he said, "I may not get to marry the widow, and if I do not, if you give me away I will kill you." I thought nothing of the remark, as I thought it good natured, and he was laughing at the time. Either wound in the body was sufficient to produce death. Tom Moore was not with Nelse when he passed my house, either going or returning.

3 witness, Will Brashear, for the prosecution:

I saw Tom Moore some time in January or February, 1889. He was then clearing some land for Palmer. I had a conversation with him, in which he said that an Indian woman claimed the land, and that he would marry her and get the land; that she was old and would not live long and he would get a good stake. He pointed out a place on the land where he said he would build his house.

22 4. John Lord, sworn, testified:

Some time prior to the death of Palmer I was in Charley Lowe's store, at Caddo, in Choctaw Nation, and heard Tom Moore talking to an Indian woman, and heard him say he would have that land. I did not know the woman and can not say she is the one he married.

5th. Harry Smith's testimony:

I was at Emmett on the day Palmer was killed. Saw Nelson Moore there about noon, but did not see Tom Moore. I saw Nelse Moore when he arrived at the mill and when he left, and didn't see Tom Moore.

6. Isom Kearney:

I did not know Palmer nor defendant, Tom Moore. I was at Jackson Conway's and started home after dinner, and Edmonson Brown was with me. We went on horseback in a north direction, and after we passed Palmer's house and when near Sandy we saw a man on the other side of Sandy, some 35 or 40 yards, away and he had some kind of gun in his right hand, and Edmonson Brown said he knew that man; that
23 his name was Tom Moore. When we saw him he was facing towards us. He turned down the creek. He had on a brown coat and white hat. I know it was the man on trial. We rode on down the road, and in about 200 yards came to a team; further on we found a chair, and still further saw a man lying in the road, on his side. We did not stop, but rode on two miles to Jonas Wolf's house, and there reported what we had seen. We heard no report of firearms. It is 300 or 400 yards from where we saw Moore to where we found the body. The road runs straight across the creek. Charley Gibson is my brother-in-law. The defendant was on foot, and Edmonson Brown and myself were on horse-

back. We had no weapons with us. We were travelling the road north and the defendant was coming south, meeting us. As soon as the defendant saw us he turned off and went down Sandy in a brisk walk out of sight of us.

7. Edmonson Brown:

I live in the Chickasaw Nation, and can not talk English. I knew Charley Palmer and Tom Moore; had known Moore about one year. On the day Palmer was killed Isom Kearney and I were going across the creek to hunt for a horse. We started from Jackson Conway's, where Isom was working, about 2 or 3 o'clock p. m., and near Sandy
24 Creek saw Tom Moore on the other side with a Winchester gun, and when he saw us he went down the creek. I just saw him a moment. He had on a brown coat and white hat. He was coming towards us, but turned off in a fast walk. I told Isom Kearney it was Tom Moore. We went on down the road and came to a wagon and horses, then saw a chair, and then a man about 400 yards from where we saw Tom Moore. Tom Moore was fifty steps from us, in the woods, when we saw him, and on the opposite of the *the* creek. He stopped when he saw us, and then turned down Sandy. We did not stop when we saw the man, but went on to the house of Jonas Wolff and there told Davis Colbert and Charley Gibson what we had seen.

Edmonson Brown, cross-examined:

I was raised in the Nation. I am about 25 years old. I had no pistol nor gun that day. Kearney had none. I have never had a pistol nor a gun at any time. I have never been hunting nor fishing at any time. I did not stop at the body to see what was the matter with him. I do not know what day it was. I had known Chas. Palmer about one year and Tom Moore two years. When we saw Tom Moore he was coming from the direction of where we found the body of Palmer.

25 Mrs. Kittie Young:

I was the wife of Charles Palmer when he was killed, and married my present husband about a year and a half ago. My husband, Charles Palmer, was killed May 25th, 1889, about two miles from home when returning from Jones' mill, to which place he started about 7 o'clock in the morning, and I was notified about 5 or 6 o'clock p. m. by John Brashear. He was killed in a thickly timbered bottom. The underbrush is not as thick at the creek as where he was killed. I went to the body in company with Mr. Hoskins, Mr. Fish, and Jim Melton. We first found the team about 200 yards from the body. The team had been stopped by running against a tree. The road was about 40 feet wide where we found the body. On the Tuesday morning following the murder I went back again to the place where Mr. Palmer was killed and went out to the right of the road where there is a swag about fifty yards across and there found some tracks leading across it from the road, and in that swag found three plain tracks made by a box-toed and broad heeled shoe, about a number seven, such as Tom Moore wore, and I know that no one else in that neighborhood wore that kind of a shoe. I have known the

defendant since November, 1888. In January or February, 1888,
26 Nelson Moore, brother of defendant, and Monroe Camp moved on a farm belonging to Jennie Conway, about a quarter of a mile from our house. They raised a crop together, but the team, wagon, implements, and cows belonged to Monroe Camp. No one lived with them except when for a short time an Indian woman cooked for them and afterwards a white woman from May to July. Early in July Nelson Moore left, saying he was going to Missouri, where his father lived. On November Nelson Moore returned, accompanied by the defendant, Tom Moore. Between the middle and last of November, 1888, Monroe Camp and Nelson Moore came to our house to borrow a horse and harness to haul a load of cotton to Caddo and drive back two cows claimed by Camp. About 9 o'clock that night they left our house, taking some harness with them. Shortly after they left I heard the report of a gun in the direction of their house. About one o'clock in the same night I heard a wagon passing; opened the door and looked out and recognized Camp's team and wagon; saw no one in the wagon, but saw some one on the opposite side of it. My husband and I had promised Mr. Camp to milk his cows while he was gone to Caddo. We went the next morning to milk the cows and found wagon tracks leading towards the bottom and re-
27 turning again on the same road, a different road from the one that passed by our house. Four days afterwards Nelson Moore came back with Camp's team and clothes and wearing his boots and said he had bought out Camp who had gone away. He had Camp's watch and all he had except the clothes Camp wore when he went away. I have not seen nor heard of Camp since that night. Five days after Nelson Moore returned the defendant came back. Tom Moore married Lizzie Lishtubbi on Tuesday and Mr. Palmer was killed on the following Saturday. On Wednesday and Thursday before the killing my husband was hunting hogs in the bottom where he saw the wagon tracks in November, and returning Tom Moore asked him if he found those hogs and then said: "I know what kind of hogs you were looking for." Tom knew he had been down in the bottom.

Cross-examined:

I do not know that Mr. Palmer had any enemies. He once had a difficulty with a Spaniard who went by several names; he went by the different names of Wesley, Downing, and Mosby; he made threats, but that was some ten or twelve years ago, and I heard that he was dead. I do not know that Camp is dead; I know that Nelson Moore claimed his
28 property. Tom Moore was arrested at my house. We rented our place from an Indian who was a full blo'd. We were not citizens. Tom Moore told me he was 24 years old and Lizzie Lishatubbie, his wife, told me she was 48 years old. Tom Moore had cleared land for Mr. Palmer and was familiar with the premises. Tom and Nelse Moore moved the Camp things out of old house into the new house after they returned. They afterwards had a dispute over a saddle that had belonged to Camp, each claiming an interest in it. Tom Moore had no money. Mr. Palmer let him and Nelse have provision. When Tom and Nelse Moore came to my house the night of killing they both had their Winchester guns with them.

9. Sadie Palmer:

I know Tom Moore. On Sunday after my father was killed Tom Moore took my little sister into the smoke-house and asked her: "Who does your mother think killed your father?" I was outside with brother playing with some blocks. My sister was ten years old and little brother five years old.

10. Mrs. Palmer:

I am the mother of Charles Palmer. I went out to where my son was killed on Tuesday afterwards. Mrs. Kittie Young
29 walked off from us, and afterwards told me she found tracks of a person; I told her to say nothing about it.

Cross-examined:

I did wish to have Charles move from that country. I did think he was not safe there.

1. R. W. Fisher, for defendant, testified:

In 1889 I lived near Moore and Palmer. On the day that Palmer was killed, about 11 a. m. o'clock, I saw Tom Moore in the bottom near Blue River. I went to the river from the field to get water. Tom Moore was on the opposite bank and said he was hunting hogs. He was in his shirt sleeves and had neither gun nor pistol. He was in a direction from Palmers opposite to that where the body of Palmer was found, and some three miles distant from it.

2. Mrs. H. Graham, for defendant:

I remember the day Charles Palmer was killed. I saw Tom Moore that morning. He was in his shirt sleeves. Saw him that night at Palmers. I was at his house that day. His wife was there. Tom and Nelson each had Winchesters and they were both there in the
30 rack. I saw Tom and Nelse Moore when they both started off in the wagon together. Nelse was driving the wagon.

3. Mrs. J. J. Melton, for defendant:

I saw Tom Moore in the morning and again at night. I know he did not carry his Winchester with him that day, for I saw his and Nelson's at his house. He was in his shirt sleeves when I saw him.

4. H. Graham, for defendant:

I saw the defendant and his brother, Nelson Moore, on the day Palmer was killed. They came from the field about 9 or 10 o'clock, hitched up their team and put in a plow and a sack, and started off together. Nelson said he was going to Emmett. Tom said he was going to hunt some hogs. They had no gun. Saw them next at Palmer's that night. Tom helped to lift the body from the wagon, helped to drep it and sat up with it, and went with another next day after material for a coffin.

5th. J. J. Melton, for defendant:

I knew Charles Palmer before his death and know Tom Moore.
31 Remember the day that Palmer was killed. I worked for a short

time in the cotton patch that morning, and went to my house. I passed by Moore's house, saw his wife and my wife there, and saw the guns of Tom and Nelson Moore there.

We, the attorneys for the defendant and the Government, agree that the above is substantially the evidence and the order of its production before the court and the jury.

FRED. W. MINER,
Attorney for Tom Moore.
ROBERT E. HANNAY,
U. S. Atty.

Approved June 1st, 1892.
DAVID E. BRYANT,
Judge.

Endorsed: C. C. No. 152. The United States vs. Tom Moore. Bill of exceptions No. 2 to ruling of the court on motion for a new trial. Filed June 1, 1892. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

32 TOM MOORE, APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } C. C. 152.

Appellant shows that he was tried in the circuit court of the United States at Paris, Texas, and convicted of the crime of murder before Hon. D. E. Bryant, judge of the eastern district of Texas, and final judgment rendered and sentence of death entered and pronounced. Appellant says that the court erred in the admission of testimony and erred in overruling his motion for a new trial, as will appear from bills of exception made a part of the record in said case. Wherefore he prays for a writ of error to the Supreme Court of the United States that said errors may be corrected and justice done in the premises.

TOM MOORE,
By FRED. W. MINER, *Attorney.*

(Endorsed:) C. C. 152. Tom Moore, appellant, vs. The United States, appellee. Petition for writ of error. Filed June 21, 1892. C. Dart, clerk. By H. H. Kirkpatrick, deputy. (Further endorsed:) Writ allowed without bond and clerk will forthwith issue writ as prayed for. Done this 16th day of July, 1892. David E. Bryant, judge.

33 In circuit court of the United States, at Paris, eastern judicial district of Texas.

TOM MOORE, APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } No. 152.

Appellant files his assignment of errors as follows:

1st. The circuit court erred in admitting before the jury the testimony made part of the record by bill of exceptions No. one, as to the disappearance of one Camp, and the subsequent possession of his personal property by Nelson Moore, because said testimony had no bearing upon the issue

between appellant and the Government, but was calculated to prejudice the minds of the jury against appellant, and prevented a fair and impartial trial; and in support of this assignment of error appellant here refers to said bill of exceptions.

2d. The circuit court erred in refusing a new trial upon the evidence as set forth in bill of exceptions number two, because said evidence does not exclude every reasonable hypothesis but that of the guilt of
34 appellant, as required by the law governing the application of circumstantial evidence in criminal cases.

TOM MOORE, *Appellant.*
By FRED W. MINER, *Attorney.*

(Endorsed:) No. 152. Tom Moore, appellant, vs. The United States. Assignment of errors. Fred W. Miner, att'y for appellant. Filed Aug. 5, 1892. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States, plaintiff, and Tom Moore, defendant, which cause is numbered 152 on the criminal docket of said court, holding sessions at Paris, Texas, a manifest error hath happened, to the great damage of the said Tom Moore, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.]

C. DART,
Clerk of the Circuit Court of the United States
for the Eastern District of Texas.
By H. H. KIRKPATRICK,
Deputy.

Allowed by—
DAVID E. BRYANT,
Judge.

36 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that I received this writ on the 18th day of July, 1892, and that on this 12th day of August, 1892, I have transmitted to the clerk of the Supreme Court of the United States a copy of the records and proceedings in the within-named cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris the day and date last above named.

[SEAL.] C. DART, *Clerk.*
By H. H. KIRKPATRICK, *Deputy.*

(Indorsed:) The United States v. Tom Moore. 20. Writ of error filed July 18, 1892. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Robert E. Hannay, United States attorney for the eastern district of Texas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the eastern district of Texas, at Paris, wherein Tom Moore is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why the judgment and sentence rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 18th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

C. DART,
Clerk U. S. Circuit Court, E. D. Texas.
By H. H. KIRKPATRICK,
Deputy.

38 On this 30th day of July, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared before me, the subscriber, W. H. Dickerson, deputy United States marshal for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Robert E. Hannay, United States attorney for the eastern district of Texas, at Paris, in the eastern district of Texas, on the 30th day of July, 1892.

W. H. DICKERSON,
Dep. Mar.

Sworn to and subscribed the thirtieth day of July, A. D. 1892.

[SEAL.] C. DART, *Clerk.*
By H. H. KIRKPATRICK,
Deputy.

(Indorsed:) No. 152. Criminal docket. United States circuit court, eastern district of Texas, at Paris. Tom Moore vs. The United States. Citation in error. Issued July 18, 1892.

39 In the circuit court of the United States for the eastern district of Texas, at Paris.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Paris, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct and complete transcript of the record and proceedings had in said court in cause No. 152 on the criminal docket of said court, entitled The United States versus Tom Moore, as the same now appears of record and on file in my office.

To certify which, witness my hand and the seal of said court, at Paris, in said district, this the 12th day of August, A. D. 1892.

[SEAL.] C. D. DART,
Clerk U. S. Circuit Court, E. D. T.
By H. H. KIRKPATRICK,
Deputy.

40 (Indorsed:) Tom Moore vs. The United States. Writ of error. From east. dist. Texas.

41 (Indorsed on cover:) Case No. 15105. Term No., 789. Tom Moore, plaintiff in error, vs. The United States. E. Texas C. C. U. S. Filed August 18, 1892. Supreme Court U. S., clerk's office. Received Aug. 17, 1892.

Office Supreme Court U. S.
FILED.
APR 22 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893

TOM MOORE, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 789

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF EASTERN TEXAS.

MOTION TO ADVANCE.

39 In the circuit court of the United States for the eastern district of Texas, at Paris.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Paris, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct and complete transcript of the record and proceedings had in said court in cause No. 152 on the criminal docket of said court, entitled The United States versus Tom Moore, as the same now appears of record and on file in my office.

To certify which, witness my hand and the seal of said court, at Paris, in said district, this the 12th day of August, A. D. 1892.

[SEAL.] C. D. DART,
Clerk U. S. Circuit Court, E. D. T.
By H. H. KIRKPATRICK,
Deputy.

40 (Indorsed:) Tom Moore vs. The United States. Writ of error. From east. dist. Texas.

41 (Indorsed on cover:) Case No. 15405. Term No. 789. Tom Moore, plaintiff in error, vs. The United States. In Texas C. C. U. S. Filed August 18, 1892. Supreme Court U. S., clerk's office. Received Aug. 17, 1892.

Office Supreme Court U. S.
FILED.
APR 22 1893
JAMES H. McKENNEY,
CLERK.

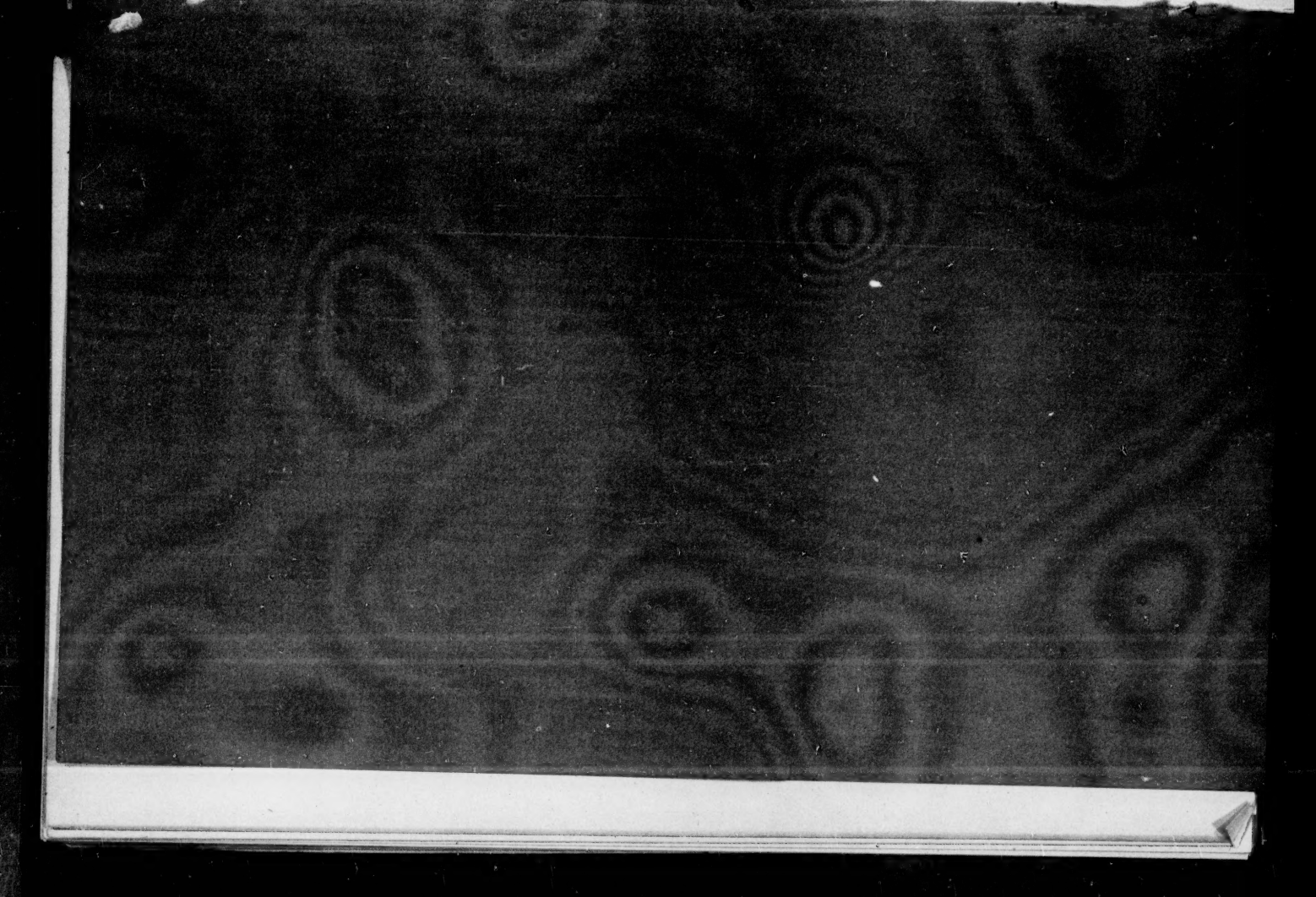
In the Supreme Court of the United States.

OCTOBER TERM, 1892.

TOM MOORE, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. ~~1185.~~ 789

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF EASTERN TEXAS.

MOTION TO ADVANCE.



In the Supreme Court of the United States.

OCTOBER TERM, 1892.

TOM MOORE, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 1135.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF EASTERN TEXAS.

MOTION TO ADVANCE.

This case is a writ of error to a judgment of the circuit court for eastern Texas, sentencing the plaintiff in error to be hanged for a murder committed in the Indian Territory.

In accordance with the provisions of section 6 of the *act of February* 6, 1889 (25 Stat. L, 656), it is respectfully moved that the case be advanced and set down for hearing at the October term, 1893.

CHARLES H. ALDRICH,
Solicitor-General.

19737

NO. 789.

IN THE

Supreme Court of the United States.

TOM MOORE, Plaintiff in Error,

VS.

THE UNITED STATES.

From the Circuit Court, E. D. of Texas, at Paris.

BRIEF FOR PLAINTIFF IN ERROR.

FRED W. MINER,
Attorney for Plaintiff in error.

P. H. BENNETT, BONHAM STREET, PARIS, TEXAS.

Tom Moore, Plaintiff in Error,

VS. { MURDER.

The United States.

PLAINTIFF'S BRIEF.

STATEMENT OF THE CASE:

In May, 1889, Tom Moore and Nelson Moore were arrested on the charge of having murdered Charles Palmer in the Indian Territory. On examining trial Nelson Moore was discharged and Tom Moore committed to jail. Both were subsequently indicted and Tom Moore tried four times and each time represented by counsel appointed by the court. On the first trial he was convicted and a new trial awarded and new indictment found. On the second and third trials a mistrial, and on the fourth a verdict of guilty, and on his motion for new trial, based upon the admission of testimony not pertinent to the issue and calculated to prejudice the jury and not competent testimony under the rules of law applicable to said case, having been over-ruled, he filed his exceptions and appealed. I feel fully justified in thus referring to history not apparent on the record, as to previous trials, because I appeared by appointment and be

cause I was surprised by the introduction of improper testimony.

On pages 1 and 2 of transcript are found the indictment, and attention is called to the endorsements following "further endorsements" and including names of "Isom Kearney" and "Edmondson Brown." On April 22nd., 1892, the jury returned their verdict of guilty, and on June 1st., 1892, sentence of death was pronounced.

On page 4 is the motion for a new trial, which was over-ruled and appellant filed his bill of exceptions:

Only two questions are raised by the assignment of errors, which are, that the court admitted illegal evidence and prejudiced the jury against appellant; and, 2nd., admitting the full weight of all the testimony it does not establish the guilt of appellant or even knowledge of the commission of said crime.

The first assignment: (tr. p 13)

"The Circuit Court erred in admitting before the jury the testimony made part of the record by bill of exceptions No. one as to the disappearance of one Camp and the subsequent possession of his personal property by Nelson Moore, because said testimony had no bearing upon the issue between appellant and the government, but was calculated to prejudice the minds of the jury against appellant and prevented a fair and impartial trial; and in support of this assignment of error appellant here refers to said bill of exceptions."

PROPOSITION:

EVIDENCE MUST RESPOND TO THE ALLEGATIONS AND BE PERTINENT TO THE ISSUE.

The court will find on examination of the exception No. 1 (tr. pp. 5 to 7.) that the learned judge admitted testi-

mony over the objection of defendant's counsel and attempted to control the effect of it on the minds of the jury by instructing them as to HIS reason for admitting it, and evidently overlooked the simple fact that the far reaching influence of words once spoken can never be recalled any more than we recall the words. Jurors are human and therefore liable to err. What effect the proof that appellant was suspected of being capable of crime may have had on the jury, only an infinite God can know. That it had weight is proved by the result.

In support of this proposition I call the attention of the court to the well considered case of the People vs Sharp, 107 N. Y., in which many authorities are cited and the conclusion reached that testimony tending "to show that the defendant was capable of committing the crime alleged in the indictment," is not admissable. (Opinion of Peckham, J. on pages 470-471.)

In the same case the following language is used:

"To adopt so broad a ground for the purpose of letting in evidence of another crime, is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence."

The second assignment is: (*tr p 14*)

"The court erred in refusing a new trial upon the evidence as set forth in bill of exceptions number two, because said evidence does not exclude every reasonable hypothesis but that of the guilt of appellant as required by the law governing the application of circumstantial evidence in criminal cases."

This assignment embodies a proposition of law as old as our system of jurisprudence and taken in connection

with the evidence set out in full in bill of exceptions 2, needs no argument further than to call attention to it.

Isom Kearney and Edmondson Brown (tr. pages 9 and 10) are the only witnesses who testify to having seen appellant within four hundred yards of the place where Charles Palmer was killed, evidently by two persons; as from the testimony of R. D. Harrell (tr. page 8) two shots penetrated Palmer, one from the left "toward the spine," and one from the right "toward the spine," and these men, Kearney and Edmondson, testify to seeing a man they claimed to recognize as appellant "fifty steps" distant in the woods with "a brown coat and white hat on," while other witnesses saw him in his shirt sleeves, unarmed, and about three miles away.

Can the life of a citizen of this country be forfeited upon such testimony? The court will pardon me for calling further attention to the evidence found on page 10 in the cross-examination of Edmondson Brown.

"I was raised in the Nation. I am about 25 years old. I had no pistol nor gun that day. Kearney had none. I have never had a pistol nor a gun at any time. I have never been hunting nor fishing at any time. I did not stop at the body to see what was the matter with him. I do not know what day it was. I had known Charles Palmer about one year and Tom Moore two years. When we saw Tom Moore he was coming from the direction of where we found the body of Palmer."

This was elicited as the record shows on the cross-examination. I ask pardon for saying, although the jury must have believed Brown and Kearney, no reasonable man who has lived on the border for 34 years and been for months with the natives, can believe Brown's testimony. Never had a gun! never hunted and never fished!!

The theory of appellant's counsel is: *Edmondson Brown and Isom Kearney murdered Charles Palmer.* There is more to support this theory than the

theory of the honorable attorney for the government.

Therefore, in view of the facts disclosed by the record and law governing the introduction thereof, I ask most confidently the reversal of the judgement against appellant.

FRED. W. MINER.
Attorney for plaintiff in error.

Office Supreme Court U. S.
FILED.
OCT 17 1893
JAMES H. McKENNEY,
CLERK.

CASE No. 15105.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TOM MOORE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 789.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

CASE No. 15105.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TOM MOORE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 789.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error was convicted for the murder of Charles Palmer on July 25, 1889, in Blue County, Indian Territory. Defendant's brother, Nelson Moore, was indicted with him, but not tried.

On the day mentioned, about 4 p. m., the body of Charles Palmer was found lying in the road in a "thickly-

timbered bottom," about 2 miles from his house. He had been seen alive at 12 o'clock. About 300 or 400 yards from the body the defendant, Tom Moore, was seen by two witnesses coming toward them and carrying a Winchester gun. When he saw them he turned off at a fast walk down the creek and out of sight. The wounds in Palmer's body were made with a Winchester gun or pistol.

Tom Moore was an impecunious person, living with his brother, Nelson Moore, about a quarter of a mile from Palmer, and had been working for Palmer, clearing his land. Palmer's land was rented from an Indian. It was also claimed by a full-blooded Choctaw woman named Lizzie Lishtubbi. Four days before the murder Tom Moore married this woman. He had previously boasted that he was going to marry the woman and get the land; that "she would not live long, and he would get a good stake." One of the witnesses "told him he would have some trouble over it, for Charlie Palmer is about the gamiest man in the Territory." He replied, "I am some that way myself."

Palmer's widow soon after the murder examined the neighborhood of the place where her husband was killed and found some tracks of shoes like those of Tom Moore's, and she knew of no one else in the neighborhood wearing that kind of shoe.

There was also the testimony bearing on motive discussed under the first assignment of error.

ASSIGNMENTS.

FIRST.

The following testimony was offered by the district attorney as bearing on motive, and was admitted under defendant's exception :

Six months before the murder, one Camp "kept batch" with the Moores at their house. The Moores were without property ; Camp had a good deal. About 9 one night, Camp and Nelson Moore tried to borrow a horse from Palmer, saying they were going to Caddo. Failing to get the horse they returned, and soon after a wagon was heard in the direction of their house. About 1 in the morning Camp's horses and wagon were seen passing Palmer's house. In the morning no one was found at Camp's house, but blood was seen there and "everything torn up around in the house." Fresh horse and wagon tracks were seen leading down to the barn and coming out again into the road passing Palmer's house. A few days later, Nelson Moore returned alone, wearing Camp's boots. The latter never reappeared. The Moores claimed to have bought Camp's clothes, horses, watch, wagon, cow, and all his property. A few days before Palmer was killed, he was down in the bottom hog-hunting. When he returned, Tom Moore asked him where he had been. When he explained, Tom Moore said, "Yes ; I know the kind of hogs you were looking for."

This testimony was objected to as irrelevant, because it was not proved that Camp was not living, because it tended to prejudice the minds of the jurors, and because

it was immaterial, as the prosecution did not need to prove motive. The court in admitting the testimony "then and there instructed the jury that it was only admitted to show motive, not that Camp had been killed by defendant, as no *corpus delicti* had been shown, and they would only consider it as to motive." He further instructed them "that there was no evidence that Camp was dead; that the testimony in regard to Camp's disappearance and subsequent appropriation of his property is only admitted for the purpose of showing motive, and that they would not consider it for any other purpose." Defendant excepted.

It is well settled that testimony otherwise proper is not objectionable because it tends to prove defendant guilty of another crime beside that for which he is indicted. (1 Greenleaf on Evidence, 15th Ed., § 53, note *b*, and cases cited; Abbott Tri. Brief, Crim. Causes, pp. 371, 373, 374, and cases cited; Wharton Crim. Ev., § 32; Farris *vs.* People, 129 Ill., 521.) Nor has it ever been doubted that all competent facts tending to show motive, malice, or intent, should be put in evidence as part of the case in chief. The instruction of the court that there was no evidence that Camp was dead is a little contradictory. The court evidently intended to be understood that there was not sufficient evidence of Camp's death to found a prosecution for that murder. There was doubtless evidence tending very strongly to show that Camp was dead, and it was introduced to show that Palmer was murdered for fear that he was engaged in searching for the *corpus delicti* with a view to the prosecution of this prisoner.

This, then, is one of the familiar cases where the trial court admits circumstantial evidence as bearing upon the

question of motive, and the appellate court is asked to reverse on the ground that the connection was too faint or improbable and the proof too remote. The general principles governing this case are well settled. Stephen on Evidence, article 7, lays down the general principle as follows:

> When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say, any fact which supplies a motive for such an act, etc.

His leading illustration on this point is *Rex* v. *Clewes* (4 C. & P., 221):

> The question is whether A murdered B. The facts, that at the instigation of A, B murdered C twenty-five years before B's murder, and that A, at or before that time, used expressions showing malice against C, are deemed to be relevant as showing a motive on A's part to murder B.

It is also well settled that great latitude is allowed to the reception of circumstantial evidence, and that "objections to testimony on the ground of irrelevancy are not favored" when circumstantial evidence is necessary. (*Castle* v. *Bullard*, 23 How., 172, 187.) It is a necessary result that questions of relevancy and remoteness must largely be left to the discretion of the trial judge and his decision reviewed only in an extreme case. "Considerable latitude is allowed on the question of motive. Just in proportion to the depravity of mind would a motive be trifling and insignificant which might prompt to the commission of a great crime." (*Hendrickson* v. *People*, 10 N. Y., 13, 31.)

The question is rather of fact than of law, and can hardly be treated with intelligence upon a bill of exceptions, which gives no adequate impression of the testimony and atmosphere of the trial.

In *Alexander* v. *United States* (138 U. S., 353, 356, 357) the question was whether the discretion of the trial judge was abused by *excluding* testimony. The court did not find it necessary to decide the question, as the decision was reversed upon another point, but Mr. Justice Brown said:

> We recognize a certain discretion on the part of the trial judge to rule out this entire testimony, both of the acts and the declarations of House, if, in his opinion, they were so remote or insignificant as to have no legitimate tendency to show that House would have committed the murder. * * * But, if, on the other hand, the time and the circumstances attending the murder were uncertain or obscure, the conduct and threats of House might have a material bearing upon the identification of the murderer. It is held by some of the authorities that the question whether such evidence should be admitted or excluded is to a certain extent a matter of discretion with the trial judge. [Citing cases.]

One of the cases cited by Mr. Justice Brown is *Commonwealth* v. *Abbott* (130 Mass., 472), in which the argument is clearly put by Colt, J., as follows:

> It is a cardinal rule governing the production of evidence, that the testimony offered must correspond to the allegations, and be relevant to the issue on trial. It is not necessary that the evidence should bear directly on the issue. It is sufficient if it tends to establish the issue, or constitutes a link in the chain of

proof. But in order to be admissible, it must either alone, or in connection with other evidence produced, be capable of affording a reasonable presumption or inference as to the principal fact in dispute. The rule excludes all collateral facts which tend to divert the mind from the real question, and are calculated only to prejudice and mislead the jury. The existence of a criminal motive is an element which it is often necessary to establish in order to give character to the acts and conduct of a party charged with or suspected of crime. In such case, the conduct or declarations of a party, both before and after the principal fact in issue, are admissible, provided they are sufficiently near in point of time, and sufficiently significant of the motive or intent to be proved. The rules which govern human conduct are to be reasonably applied in these cases, as in all other investigations of fact. They are to be so applied in all cases where the inquiry is as to the mental or moral condition of a person at the time a particular act was done. The intent or disposition, when it constitutes an element of crime, can only be ascertained, as all moral qualities are, from the acts and declarations of the party.

It is difficult, in dealing with this description of evidence, to define, as matter of law, the precise limits which must practically control its admission. (*Cook* v. *Moore*, 11 Cush., 213.) In *Shailer* v. *Bumstead* (99 Mass., 112) where the mental condition of a testator was the subject of inquiry, on the question of undue influence exerted at the time the will was executed it was said: "If therefore the statement or declaration offered has a tendency to prove a condition not in its nature temporary and transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue till the

> contrary be shown, the declaration, though prior in time to the act the validity of which is questioned, is admissible. Its weight will depend on its significance and proximity. It may be so remote in point of time, or so altered in import by subsequent changes in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge." To a great extent, it must be left to the presiding judge to determine upon the facts before him how far evidence of this description may have a tendency to throw light on the fact to be found, namely, the actual condition at the date of the will. Some limit must of course be had in appiying practically the rules which govern the admission of this evidence. (99 Mass., 120, 130.) And in *Thayer* v. *Thayer* (101 Mass. 111, 113), where the fact to be proved was the existence of an adulterous disposition toward a particular person at a time fixed, and the evidence was of such a disposition toward the same person at subsequent time, it was said that "the limit, practically, to the evidence under consideration is that it must be sufficiently significant in character, and sufficiently near in point of time, to have a tendency 'to lead the guarded discretion of a reasonable and just man' to a belief in the existence of this important element in the fact to be proved. If too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case."

In the once famous murder trial of Jesse Pomeroy, reported on appeal at 117 Mass., 143, much evidence was admitted which was claimed to be irrelevant and remote, bearing upon the question of sanity. Wells, J., said, page 148:

> It is for the court or judge presiding at the trial to determine, in the first instance, whether the facts

> offered to be proved would, if established, fairly justify any inference relating back to the time of the alleged offense. This inquiry always and necessarily involves not only the question of intervening time and occurrences, but also the character of the manifestations and the circumstances under which they were observed. It is, in a measure, a matter of judicial discretion; insomuch, at least, that great weight and consideration will be accorded to the judgment of the judge whose decision is brought up for revision (*Shailer* v. *Bumstead*, 99 Mass., 112, 130. *Commonwealth* v. *Coe*, 115 Mass., 481, 505.)

The latest well-known application of the rule was in the case of *People* v. *Carlyle W. Harris*, reported on appeal at 136 N. Y., 423, where the circumstantial evidence offered to prove motive and claimed to be irrelevant is discussed by Gray, J., at pages 446 to 452.

In *Murphy* v. *People*, 63 N. Y., 590, 594, it was held competent to show that litigation was pending between the parties, as the jury might find that the murder was to prevent the appearance of deceased as a witness.

In *Kennedy* v. *People*, 39 N. Y., 245, 254, 260, testimony that deceased, a solitary if not miserly man, had received some gold six months before the murder was held competent, as, though the evidence "was slight in the bearing on the guilt of the prisoner," yet it bore upon the question of motive, and: "The time that had elapsed after such receipt of gold by the deceased was for the consideration of the jury. It was not so long that the court could determine that it had no tendency," etc.

It is respectfully submitted that the testimony objected to was proper, or at least within the discretion of the

trial court to admit. The murder of Camp was made extremely probable, and the fear of defendant that Palmer was investigating the circumstances not at all impossible.

SECOND.

The second objection was to the denial of a motion for a new trial. The motion was made on three grounds: First, that the verdict "is not supported by the amount and character of evidence that is required by law;" second and third, repetitions of the objection already stated to the Camp incident. The latter needs no further discussion.

The first ground of the motion seems to be intended merely to raise the same question in a different way, the phrase "not supported by that * * * *character* of evidence" referring to the widow's testimony about the disappearance of Camp. If so, it does not need further comment. If intended to raise the general question that there was no evidence upon which the jury could find a verdict, it seems somewhat inconsistent with the argument of the prisoner's counsel at the foot of page 6 of the record, that "*the killing having been shown and the defendant connected with it*, the burden of showing the absence of motive, malice, or intent devolves upon the defendant." No such evidence was offered by the defendant. He did not take the stand, and the main evidence was an *alibi*, not as to defendant himself, but as to his gun. In other words, the witnesses swore that while defendant was off all day hog-hunting, he did not take his gun with him. Defendant's counsel was clearly correct in saying that the

killing was shown and the defendant connected with it; while there was evidence of motive in trying to get rid of one strong supporter of a rival claim to property.

But no exception lies to the denial of a motion for a new trial. It is a perfectly proper consideration for the trial court whether the verdict is against the weight of evidence; but this motion is addressed to the discretion of the court, and error can not be assigned upon its denial. If defendant's counsel is of the opinion that there is no evidence to go to a jury, his plain course is to move for a direction of an acquittal (2 Bishop Crim. Proc., § 977, and cases cited), and except if the motion is denied.

Denial of a motion for a new trial is not assignable error (*Henderson* v. *Moore*, 5 Cranch, 11; *Marine Ins. Co.* v. *Young*, *id.* 187; *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 218; *Blunt* v. *Smith*, 7 Wheat., 248; *McLanahan* v. *Universal Ins. Co.*, 1 Pet., 183; *United States* v. *Buford*, 3 Pet., 32; *Brown* v. *Clarke*, 4 How., 4, 15; *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall., 592, 597, 598; *Freeborn* v. *Smith*, 2 Wall., 160, 177; *Newcomb* v. *Wood*, 97 U. S., 581, 583, 584; *Railway Co.* v. *Heck*, 102 U. S., 120; *Hanna* v. *Maas*, 122 U. S., 24, 26; *Crumpton* v. *United States*, 138 U. S., 361, 365; and other cases cited in 1 Indexed Dig. U. S. Sup. Ct. Rep. (L. Co-op. Pub. ed., pp. 146, 147), whether on the ground that the verdict was contrary to law and unwarranted by the testimony or otherwise (*Wilson* v. *Everett*, 139 U. S., 616, 621.) "No authorities need be cited in support of the proposition." (*Van Stone* v. *Stillwell Co.*, 142 U. S., 128, 134.) "It is too plain for argument." (*Barr* v. *Gratz's Heirs*, 4